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No. 10-74

In the Supreme Court of the United States

JAVIER RIVERA AQUINO, SECRETARY, PUERTO RICO DEPARTMENT OF AGRICULTURE, ET AL., PETITIONERS

v.

SUIZA DAIRY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR TEXAS, ARKANSAS, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, AND VIRGINIA AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Petitioners are correct that the First Circuit's decision significantly—and erroneously—expands the doctrine of *Ex parte Young* and thereby portends "profound consequences for other sovereigns." Pet. 21. According to the holding below, settled principles of sovereign immunity vanish whenever an award of

[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received timely notice of amici curiae's intent to file this brief, and consented to it.

retrospective monetary relief is not satisfied directly from the public fisc. This is true, according to that decision, even where state officials (in their official capacity) are *judicially compelled* to invoke the State's core regulatory powers to fund the compensatory award. This case thus presents exceptionally important questions concerning sovereign immunity, the *Ex parte Young* doctrine, and the susceptibility of state officials to claims for retrospective relief. In light of its plain "importance" and its high "stakes for the [S]tates in the many cases in which individuals seek compensation for past constitutional violations," Pet. App. 56a (Lynch, J., dissenting from denial of rehearing en banc), the amici States have a distinct interest in the correct disposition of this matter.

DISCUSSION

The First Circuit held that sovereign immunity does not bar the imposition of retrospective relief against a State (through its officials) unless public funds are directly extracted from the state treasury. Pet. App. 21a-28a. This decision conflicts with the uniform view of every other circuit to have considered this question under the prevailing framework—and it does so by sharply departing from this Court's settled jurisprudence in the area.

Under established law, respondents cannot pierce the Commonwealth's sovereign immunity—which otherwise categorically bars any official-capacity suit—without invoking the narrow exception found in *Ex parte Young*. That exception is limited to vindicating the federal interest in securing *prospective* compliance with federal law—and it emphatically does not authorize courts to order

retrospective relief. There accordingly is no basis in law or logic for suggesting (as the First Circuit incorrectly did) that immunity principles turn on the *source* of any compensatory funds rather than the character (prospective or otherwise) of the State's putative violation. Because both the strict letter and underlying rationale of *Ex parte Young* are carefully calibrated to avoid retrospective impositions on sovereign entities, the First Circuit was incorrect to upset this delicate balance.

Moreover, the decision below is wrong even on its own terms. There is no difference, practically or legally, between (i) an order compelling a State to collect and deposit funds into a specific account earmarked for retrospective monetary relief (which the court below deemed permissible) and (ii) an order compelling a State to collect funds deposited *into the general treasury* and earmarked for the same retrospective relief (which even the court below found impermissible). The source of the funds is still the same citizenry compelled to contribute public money to the same cause based on the same exercise of regulatory power. There is no magic (much less constitutional significance) to the location where the funds are stored—and no less interference with the State's sovereign authority to determine when and how to collect and disburse public funds.

Nor is that interference at all insubstantial. The district court's order, upheld by the First Circuit, authorized the federal judiciary to commandeer state officials and compel them to invoke the Commonwealth's regulatory machinery. The court of appeals was surely correct that this directive served to avoid a plainly impermissible judicial decree for a

retrospective lump-sum payment. But the court was just as surely mistaken that this sort of end-run is consistent with the States' role as co-equal sovereigns in our federalist system, or permissible in any way under established principles of sovereign immunity.

Because this decision is "flatly contrary to this Court's controlling precedent," *Arkansas* v. *Sullivan*, 532 U.S. 769, 771 (2001) (per curiam), the States respectfully submit that summary reversal is appropriate under these circumstances. See Sup. Ct. R. 16.1; Eugene Gressman et al., *Supreme Court Practice* § 5.12(a), (c) (9th ed. 2007). This Court has invoked that procedure in the past to protect state sovereign immunity, see, *e.g.*, *Fla. Dep't of Health & Rehabilitative Servs.* v. *Fla. Nursing Home Ass'n*, 450 U.S. 147 (1981) (per curiam); *Alabama* v. *Pugh*, 438 U.S. 781 (1978) (per curiam), and it should do so here. At a minimum, the petition should be granted.

A. Absent An Unmistakable Waiver Or Explicit Abrogation, Sovereign Immunity Bars Federal Courts From Imposing Retrospective Relief In Private Suits Against States Or State Officials In Their Official Capacities

1. The law governing the correct disposition of this case is so settled that it barely requires any discussion at all. Sovereign immunity prevents a private party from subjecting a State to suit without its consent. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 712-713 (1999); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 267-268 (1997); *Ex parte New York*, 256 U.S. 490, 497 (1921); *Hans* v. *Louisiana*, 134 U.S. 1, 9-21 (1890). The doctrine protects a State's dignity

and its treasury, *e.g.*, *Seminole Tribe* v. *Florida*, 517 U.S. 44, 58 (1996); these fundamental interests were of such central concern to the Founders that the judiciary's initial failure to recognize the States' immunity was met with an immediate constitutional amendment, see *Coll. Sav. Bank* v. *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999) (describing the Eleventh Amendment's swift passage in response to *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793)); see also *Alden*, 527 U.S. at 720. Nor may parties evade the immunity bar (or undercut its underlying interests) by suing a State's agencies or its officials: a suit against a state official, in his or her official capacity, is deemed equivalent to a suit against the State itself, and so the full immunity protecting the sovereign applies. See, *e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 100-102 (1984); *Ford Motor Co.* v. *Dep't of Treasury*, 323 U.S. 459, 462-464 (1945); *Poindexter* v. *Greenhow*, 114 U.S. 270, 287 (1885).[2]

2. The Court in *Ex parte Young*, 209 U.S. 123 (1908), created an important exception to this Eleventh Amendment immunity- but one narrow in

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[2] This brief refers to *States* and *state sovereign immunity* because the First Circuit has long held that the Commonwealth of Puerto Rico and amici States are identical for purposes of sovereign-immunity analysis. See, *e.g.*, *Diaz-Fonseca* v. *Puerto Rico*, 451 F.3d 13, 33 (1st Cir. 2006), Pet. 7 n.1. This brief also employs the phrase *Eleventh Amendment immunity* as a "convenient shorthand," *Alden*, 527 U.S. at 713. "[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." *Fed. Mar. Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002).

scope and carefully tethered to its animating rationale. See, *e.g.*, *P.R. Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (noting the "exception").

In *Ex parte Young*, the Court allowed a private party to pursue prospective injunctive relief in federal court against a state official to enjoin the enforcement of an unconstitutional state statute. In doing so, the Court avoided the issue of sovereign immunity by treating the suit as if it ran only against the official himself, rather than the State—in a manner the Court has characterized as a "fiction," given the traditional view that sovereign immunity extends to suits against state officials (in their official capacity) as well as States. See, *e.g.*, *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 378 n.14 (2006) (referring to *Ex parte Young* doctrine "as an expedient 'fiction' necessary to ensure the supremacy of federal law"); *Coeur d'Alene*, 521 U.S. at 270 (referring to "the *Young* exception" as "an obvious fiction"). The Court reasoned that officials cannot invoke the State's immunity when they violate federal law because all unconstitutional statutes are void: without the protection of the (void) state statute, an official is "stripped of his official or representative character and * * * subjected in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. at 159-160.

This exception, however, is not categorical in nature, and it hardly "insulate[s] from Eleventh Amendment challenge every suit in which a state official is the named defendant." *Papasan* v. *Allain*, 478 U.S. 265, 277 (1986). See also *Pennhurst*, 465 U.S. at 102 ("[T]he theory of *Young* has not been

provided an expansive interpretation."); Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 892-896 (6th ed. 2009). On the contrary, the Court constrained the *Ex parte Young* doctrine in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), recognizing a "distinction between prospective and retroactive relief [that] continues to lie at the center of the Court's Eleventh Amendment jurisprudence," 1 Laurence H. Tribe, *American Constitutional Law* 559 (3d ed. 2000). "The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other." *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979).

These limits on *Ex parte Young* reflect the doctrine's underlying rationale. In restricting relief to prospective remedies, the Court struck an important balance between the need to protect the primacy of federal law (as required by the Supremacy Clause) and the countervailing need to protect sovereign immunity (as required by the underlying constitutional structure). See *Pennhurst*, 465 U.S. at 106 (describing the limits as "reconcil[ing] competing interests" in "vindicat[ing] the supreme authority of federal law" and "preserving to an important degree the constitutional immunity of the States"). Well aware of "the role of the [Eleventh] Amendment in our system of federalism," *P.R. Aqueduct*, 506 U.S. at 146, the Court has carefully avoided "stretch[ing] [*Ex parte Young*] too far and * * * upset[ting] the balance of federal and state interests that it embodies," *Papasan*, 478 U.S. at 277. A sensitive calibration of

the "proper scope and application" of *Ex parte Young* therefore "ensure[s] that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law." *Coeur d'Alene*, 521 U.S. at 269.

These general principles lead to a settled standard for evaluating a suit in federal court against a sovereign State and its officials. "In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md. Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (alteration in original) (quoting *Coeur d'Alene*, 521 U.S. at 296 (O'Connor, J., concurring in part and concurring in the judgment)). In focusing on ongoing violations and prospective relief, *Ex parte Young* secures compliance with federal law without unduly intruding into the sphere of state autonomy.

B. Contrary To The Decision Below, Sovereign Immunity Precludes Any Retrospective Monetary Relief Against A State Entity—No Matter The Source Of The Funds

In its decision below, the First Circuit held that sovereign immunity is inapplicable in official-capacity suits so long as no money is ultimately extracted from the state treasury. Specifically, under the panel's view, any State can be forced by judicial decree to collect funds from its citizens and deliver them to private plaintiffs as compensation for past harms. That view is fundamentally mistaken.

Indeed, the judgment below conflicts with the "straightforward inquiry" reaffirmed in *Verizon*, 535 U.S. at 645, and reflected in the consistent teachings of this Court's precedent since *Ex parte Young*. It upends the entrenched distinction between prospective and retrospective relief and replaces it with an unprecedented focus on state treasuries. It also wrongly concludes that an order commandeering state officials to regulate in their official capacity has no implications at all for the State's sovereignty. Contrary to the panel's opinion, this new approach is impossible to square with the existing jurisprudential framework. It should be rejected.

1. The court of appeals failed to adhere to either the explicit dictates or the underlying rationale of *Ex parte Young*. To be sure, the decision below does reference *Edelman*'s distinction between prospective and retrospective relief in the *Ex parte Young* context. Pet. App. 23a. According to the panel, however, "the Eleventh Amendment's prohibition against retrospective relief does not apply" unless "state funds are implicated." *Id.* at 26a. This novel idea drives the decision below. See, *e.g.*, *id.* at 24a (agreeing that "even if the form of relief is deemed retroactive, sovereign immunity should present no bar, as none of the compensation would come from the state treasury"); *id.* at 25a (rejecting the "contention that retrospective relief *that does not reach the state treasury* is barred by sovereign immunity"); *id.* at 47a (Torruella, J., concurring in denial of rehearing en banc) (asserting that the panel correctly "place[d] decisive weight on the impact a judgment has on the state treasury").

This view is irreconcilable with controlling precedent. As *Edelman* established, the fiction of *Ex parte Young* applies only to claims for prospective relief—a necessary condition that must be satisfied at the outset. See *Coeur d'Alene*, 521 U.S. at 270 (majority opinion) (noting *Edelman*'s "limitation * * * of *Young* to prospective relief"); *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977) (noting "the prospective-compliance exception reaffirmed by *Edelman* * * * which had its genesis in *Ex parte Young*"); *Edelman*, 415 U.S. at 664, 665, 666 n.11, 677 (noting that *Ex parte Young* awarded only prospective relief). This Court has repeatedly distinguished between prospective and retrospective relief, and with good reason. The point of *Ex parte Young*'s balancing is to vindicate the federal interest in securing compliance with federal law without unduly infringing upon the State's constitutional interest in its underlying sovereignty. A federal court can halt an ongoing violation by ordering prospective injunctive relief, thereby ensuring the supremacy of federal law. Retrospective relief, by contrast, cannot prevent past violations of federal law involving conduct already completed. This is why the Court's precedent "does not bar only retroactive monetary relief, but rather *all* retroactive relief." *S & M Brands, Inc.* v. *Cooper*, 527 F.3d 500, 509 (6th Cir. 2008).

The decision in *Green* v. *Mansour*, 474 U.S. 64 (1985), is illustrative. In *Green*, private plaintiffs sued state officials for calculating welfare benefits in violation of federal law. *Id.* at 65. Congress changed the law while the suit was pending, bringing the officials' conduct into compliance and mooting any claim for prospective relief. *Ibid.* Plaintiffs

nevertheless sought "notice relief"—a non-monetary form of relief simply providing information to plaintiffs' class about putatively wrongful past conduct—along with a declaratory judgment that prior calculations had violated federal law. *Ibid.*

The Court articulated its rationale at the outset:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of federal law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

474 U.S. at 68 (citations omitted).

Although the notice relief called for no payments from the state treasury, the Court declared it barred by state sovereign immunity because it was purely retrospective and in no way ancillary to any prospective relief: "Because 'notice relief' is not the type of remedy designed to prevent ongoing violations of federal law, the Eleventh Amendment limitation on the Art. III power of federal courts prevents them from ordering it as an independent form of relief." 474 U.S. at 71. The Court likewise held that state sovereign immunity prevented issuance of a backwards-looking declaratory judgment because such relief would open the state officials to monetary liability in state court and thus enable "a partial 'end run' around [*Edelman*]." *Id.* at

73. *Green* thus reaffirmed the distinction between prospective and retrospective relief, while demonstrating, through its denial of notice relief, that an impact on the state treasury is not a necessary condition for a sovereign immunity bar.

The decision below stands in stark contrast to this controlling analysis. The relief upheld by the First Circuit against a sovereign immunity challenge—a judicially imposed surcharge of 1.5¢ for every quart of milk sold in Puerto Rico, Pet. App. 22a & n.17—is even more detrimental to the precepts of sovereign immunity than the notice relief condemned in *Green*. The milk surcharge is retrospective. See *Buckhanon* v. *Percy*, 708 F.2d 1209, 1215 (7th Cir. 1983) ("[T]he date for determining whether a monetary award is retroactive or prospective is that upon which the district court determined that the state's conduct was wrongful." (citing *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 451 (1976))). The district court granted the preliminary injunction on July 13, 2007, Pet. App. 69a, at which time it ordered petitioners "to adopt a temporary mechanism that will allow [respondents] to recover the new rate of return * * * for the year 2003 * * * and up to the day when they begin to recover said rate based on the new regulatory standards and corresponding order," *id.* at 197a. The panel defended this relief on the ground that the milk surcharge requires no payments from the state treasury. Pet. App. 26a (finding that "no state funds are implicated"); contra *id.* at 65a-66a (Lynch, J., dissenting from denial of rehearing en banc) (arguing that "[t]his is plainly relief that reaches the state fisc"). But here, as in *Green*, the retrospective milk surcharge should be barred by

Eleventh Amendment immunity irrespective of its effect, if any, on the state treasury—the threshold for setting aside sovereign immunity (read: *prospective* relief) was not met.

It has been said that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Edelman*, 415 U.S. at 667. This difficulty is present in cases where the line separating prospective from retrospective relief is elusive. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 132 n.5 (1995) (Thomas, J., concurring) (noting the conceptual difficulty). But this is no such case. This case involves an obvious example of retrospective relief; the panel below simply refused to recognize that the prospective nature of any relief is a necessary (not merely sufficient) condition for invoking any exception to the States' sovereign immunity. This Court has cautioned that "extend[ing] the fiction of [*Ex parte*] *Young* to encompass retroactive relief * * * would effectively eliminate the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105. Yet the decision below, if allowed to stand, would endorse just such an expansion—and compel a corresponding detraction from the core principles underpinning sovereign immunity. For that reason alone, the decision should be swiftly reversed.

2. Nor is the First Circuit correct that sovereign immunity is not implicated in the first place (rendering the prospective/retrospective distinction irrelevant) unless funds from the state treasury are immediately at risk. This contention is twice wrong. As an initial matter, the principle of sovereign

immunity is not so limited in scope—indeed, controlling precedent establishes that exactly the opposite is true. And in any event, when public funds are levied, collected, and remitted by direct compulsion of state law, there is no material distinction between fees deposited in a separate account and fees deposited in the state treasury.

a. The First Circuit's mistaken conclusion follows directly from its flawed premise that sovereign immunity protects a State's treasury and virtually nothing else. This view "reflects a fundamental misunderstanding of the purposes of sovereign immunity." *S.C. State Ports Auth.*, 535 U.S. at 765. Absent from the First Circuit's account is an acknowledgement of the States' central interest in their independence as one half of our system of dual sovereignty—and the States' related (and well recognized) dignity inherent in "their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden*, 527 U.S. at 748.

In isolating its focus on the state treasury, the court of appeals is correct, of course, that a private party cannot sue a state official for compensatory damages drawn from the public fisc. *E.g.*, *Edelman*, 415 U.S. at 663 (citing *Ford Motor Co.*, 323 U.S. at 464). But sovereign immunity does not start and stop with the public fisc; it extends further and protects against all other forms of retrospective relief. See *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 437 (2004) ("Federal courts may not award retrospective relief, *for instance*, money damages or its equivalent, if the State invokes its immunity." (emphasis added)); *Coeur d'Alene*, 521 U.S. at 288 (O'Connor, J., concurring in part and concurring in

the judgment) ("A federal court cannot award retrospective relief, designed to remedy past violations of federal law." (citation omitted)); *id.* at 298-299 (Souter, J., dissenting) ("The plaintiff * * * must seek prospective relief to address an ongoing violation, not compensation *or other retrospective relief* for violations past." (emphasis added)); cf. *Cory* v. *White*, 457 U.S. 85, 90 n.2 (1982) ("*Edelman* recognized the rule that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment, but *never asserted that such suits were the only ones so barred.*" (citation and internal quotation marks omitted; emphasis added)).

The court of appeals is consequently incorrect that this Court has "consistently considered the source of relief as being of paramount importance to Eleventh Amendment considerations." Pet. App. 25a (citing *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994)). Instead, "[t]he preeminent purpose of state sovereign immunity is to accord States the *dignity* that is consistent with their status as sovereign entities." *S.C. State Ports Auth.*, 535 U.S. at 760 (emphasis added). Although protecting the state treasury is a weighty concern, safeguarding the dignity of the States has also assumed a crucial role in this Court's sovereign-immunity jurisprudence. See, *e.g.*, *Coeur d'Alene*, 521 U.S. at 268 (noting "the dignity and respect afforded a State, which the immunity is designed to protect"); *Seminole Tribe*, 517 U.S. at 58 ("The Eleventh Amendment does not exist solely in order to 'preven[t] federal-court judgments that must be paid out of a State's treasury,' [*Hess*, 513 U.S. at 48]; it also serves to

avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,' [*P.R. Aqueduct*, 506 U.S. at 146]."). Nor is this dignity rationale a theoretical novelty. See *In re Ayers*, 123 U.S. 443, 505 (1887) ("The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."). Indeed, the dignity rationale is so commonplace that it even appears in the single Supreme Court opinion referenced by the First Circuit in support of its unduly narrow conception of sovereign immunity. See *Hess*, 513 U.S. at 52 (referring to "the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment").[3]

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[3] The First Circuit placed excessive reliance on *Hess* while placing virtually none on the decisions noted in the text. Yet *Hess* is inapposite, it concerned *who* is protected by sovereign immunity, not the scope of *what* that immunity protects. *Hess* thus held that a bistate railway authorized by interstate compact enjoyed no Eleventh Amendment immunity because it was not an arm of either of its founding States. 513 U.S. at 52-53. The fact that the source of state funds is only one factor (not even the *exclusive* one) in the arm-of-the-state analysis suggests that the court of appeals erred in failing to acknowledge other immunity-related considerations. Here, of course, respondents sued petitioners in their respective capacities as state officials, Pet. App. 4a, so there is no question that this is a suit against a State, and no need for any arm-of-the-state analysis. See *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." (citation omitted)).

Regents of the University of California v. *Doe*, 519 U.S. 425 (1997), further undermines the First Circuit's exclusive focus on the state treasury. In that case, the Court rejected an argument "that the Eleventh Amendment does not apply to this litigation because any award of damages would be paid by [a third party], and therefore have no impact upon the treasury of the [State]." *Id.* at 431. This decision stands in stark contrast to what Chief Judge Lynch described as the First Circuit's proposed "exercise in forensic accounting." Pet. App. 66a (Lynch, J., dissenting from denial of rehearing en banc). Indeed, were it true that sovereign immunity depends solely on who cuts a check at the close of litigation, States could *extend* their sovereign immunity by indemnifying state officials in individual-capacity damage suits. Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232, 237-238 (1974) (allowing such suits). But the federal courts have already rejected such machinations. See Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and The Federal System* 999-1000 (5th ed. 2003); 13 Charles Alan Wright et al., *Federal Practice and Procedure* § 3524.2, at 282-283 (3d ed. 2008). Given that "a State may not confer Eleventh Amendment immunity on an entity or individual who would otherwise not enjoy that immunity simply by volunteering to satisfy judgments against the entity," *Doe*, 519 U.S. at 428, it stands to reason that a State does not lose its immunity when compelled by judicial decree to "volunteer" the funds of others.

b. The First Circuit is also incorrect that the States' constitutional immunity turns on the label attached to the public account that satisfies a

compensatory award. It is a distinction without a difference whether public funds are extracted from the general treasury or a designated account. This principle is apparent from the very order in this case: the reason the milk surcharge would not reach the public fisc is that the injunction itself directs the funds elsewhere in advance. This scheme is therefore materially indistinguishable (from the Commonwealth's perspective) from an order to distribute the same funds out of the general treasury—funded by the same taxpayers who contribute money by compulsion of the same law.

If a court cannot evade sovereign immunity by ordering an immediate lump-sum payment, there is no basis, as a legal or logical matter, for presuming a court could accomplish the identical result by ordering a future payment from a designated account created by the State's regulatory powers. This is precisely the kind of "forensic accounting" that has no obvious foundation in the constitutional structure. Pet. App. 66a (Lynch, J., dissenting from denial of rehearing en banc). Because the funds are properly characterized as public funds, the court of appeals' reasoning even fails on its own terms.

What matters in the end is the *incidence* of legal liability, see *Doe*, 519 U.S. at 431, *not* the technical source or location of any funds. Nor is there any doubt, contrary to the decision below, that the order established fault. The incidence of liability plainly fell on the Commonwealth—otherwise there would have been no basis for ordering a *non-liable* party to do much of anything, much less to order that party to invoke its sovereign powers at the behest of the federal judiciary.

3. The court of appeals also failed to recognize that sovereign immunity is implicated by a judicial decree compelling state officials to use the power of their office to regulate the citizenry—all with the aim of collecting public funds to satisfy a retrospective monetary award. Indeed, from the sovereign's vantage point, it is not clear exactly which of the following options is worse: an order extracting preexisting funds from the public treasury for retrospective relief, or an order compelling a State to invoke its regulatory machinery, in its sovereign capacity, to raise additional funds to cover the same retrospective payment. While respondents might not be taking funds directly from the State, the retrospective relief they seek (see Pet. 3 ("to recover the losses they have experienced" (quoting Second Am. Compl. ¶ 92, at 39))) still constitutes an order to satisfy an accrued liability that the Eleventh Amendment surely condemns. See, *e.g.*, *Papasan*, 478 U.S. at 279-281 (holding that Eleventh Amendment immunity bars suit for what was "in substance the award, as continuing income rather than as a lump sum, of an *accrued* monetary liability" (internal quotation marks omitted)).

Nor is this case anything like *Milliken*. That decision upheld an injunction ordering a State to pay millions of dollars toward a remedial education program for children suffering the lingering effects of racially segregated schools. 433 U.S. at 269, 288-290. Such relief was held to "fit[] squarely within the prospective-compliance exception reaffirmed by *Edelman*" and found necessary to cure *ongoing* violations of federal law. *Id.* at 289. Here, by contrast, plaintiffs sought an accrued monetary

liability—exactly the kind of relief *Milliken* itself rejected in explaining what it was *not* doing: "[T]here was no money award here in favor of [plaintiff] or any members of his class. This case simply does not involve individual citizens' conducting a raid on the state treasury for an *accrued* monetary liability." *Id.* at 290 n.22 (emphasis added).

That respondents "raid[ed]" the state armory instead of the state treasury is immaterial to the sovereign-immunity analysis. With their judicially imposed milk surcharge, respondents seek to commandeer the authority of state officials to obtain funds from Puerto Rican consumers. The milk surcharge does not differ from a tax in any meaningful way. Compare Pet. App. 64a-65a & n.11 (Lynch, J., dissenting from denial of rehearing en banc), with *id.* at 26a (panel opinion). The Court has held, in Eleventh Amendment cases involving frustrated state bond-holders, that "[a] private party cannot by judicial decree force a state officer to levy a tax." *Vann* v. *Kempthorne*, 534 F.3d 741, 753 (D.C. Cir. 2008) (describing this Court's jurisprudence). See *North Carolina* v. *Temple*, 134 U.S. 22, 30 (1890); *Hagood* v. *Southern*, 117 U.S. 52, 65-71 (1886); *Louisiana* v. *Jumel*, 107 U.S. 711, 720-723 (1883). In those cases, as here, private litigants sought to compel state officials to collect money from the public and transfer the funds elsewhere. This Court rejected such attempts as a result of sovereign

immunity; the First Circuit's failure to follow suit in this case warrants review—and reversal.[4]

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[4] Nor would respondents be correct to argue that subsequent events undermined the nineteenth-century bond cases. The 1908 decision in *Ex parte Young* did not overrule them, see, *e.g.*, *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 296-297 (1937) (citing these cases alongside *Ex parte Young* as good law), and there was no occasion to overrule the Eleventh Amendment prohibition against judicial taxation in the school desegregation cases, which involved injunctions compelling *local*, not state, officials to levy taxes, see *Missouri* v. *Jenkins*, 495 U.S. 33, 55-56 & n.20 (1990); *Griffin* v. *County Sch. Bd.*, 377 U.S. 218, 232-233 (1964), cf. *Hibbs* v. *Winn*, 542 U.S. 88, 111 n.12 (2004) ("In school desegregation cases, as a last resort, federal courts have asserted authority to direct the imposition of, or increase in, *local* tax levies * * * ." (emphasis added)).

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed. Alternatively, the petition should be granted, and the case should be set for briefing and oral argument.

Respectfully submitted.

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